

159390

FEDERAL RAILROAD
ADMINISTRATION

January 29, 2002

2002 FEB -5 PM 2:59

Memorandum to: Lamar Alan

OFFICE OF CHIEF COUNSEL

From:

Barb Butler

Re:

Notice of Proposed Rulemaking
Docket No. FRA 2001-11068 -/0
Application of 49 CFR Part 219 to Foreign Railroad
Operations

Please do not consider this a formal submission, as I really do not represent any specific organization, and have not consulted with the Canadian railroads on their responses. These are merely some comments based on my review of the regulations spinning from some of the implementation issues we faced when applying the Federal Motor Carrier Safety Administration regulations to Canadian based companies. They may help when you are reviewing comments from others in Canada. I may be raising points that appear to be obvious from your perspective, but my experience has been that you have to be absolutely clear, or someone attempting to avoid compliance may find a "loop-hole" which will ultimately need to be clarified.

1. Application: The way I read the rule, it only applies to covered employees "who are assigned to perform train or dispatching service in the U.S. subject to the hours of service laws, whether they are foreign- or domestically-based." It would not apply to Canadian based individuals who would never cross the border unless extraterritorial dispatch is permitted in which case those dispatching trains to and from the U.S. would be covered.

This means that Canadian companies will need to designate crews solely for cross-border routes as opposed to Canadian routes in order to ensure FRA testing is handled independently from any other testing they may do under company policy. Keeping separate pools could be logistically difficult in this industry, but I leave it to the carriers to advise you on this - it certainly was possible to sort out in the motor carrier industry. Companies either assigned everyone to cross border (one pool), applied the random program only to cross-border drivers (one pool ignoring the rest) or applied the random program to all drivers and set up two pools (Canada/U.S.) for selection. I'm not sure if the same breakdown is possible in the rail industry.

2. Where Testing Takes Place: As you know, there are three labs certified by DHHS for U.S. testing programs in Canada. Therefore all testing triggers that take place on the Canadian side can be handled here, and the labs have the

capacity to handle the expanded programs.

However, if the definition of covered service literally means there could never be testing in Canada - only when the individuals are in the U.S. - I am not sure how this meets overall safety objectives for crews that are assigned for U.S. work that originates in Canada.

For example, clarification is needed on post accident triggers. Under the motor carrier rules, the interpretation was that post incident testing would be triggered for any incident in the U.S., and any incident that takes place between the border the first terminal or the last terminal and the border. Most companies test all drivers after any triggering incident anyway, but the first three are under the DOT umbrella while the rest are non-DOT. I suppose the same principle would make sense for the rail industry. With regard to testing at the U.S. lab, it is my understanding that transfer of urine samples southbound has not been a problem (northbound is apparently a problem) but I have no information on other post incident toxicological samples and the ability to ship them across the border to your designated lab. Again, if the triggers are solely when the incident takes place in the U.S. this would not be an issue.

With respect to random testing, is your assumption that all random testing would only take place when employees are in the U.S.? In trucking, most random testing is just before, during or just after performing a safety-sensitive function no matter what direction they are going; if they are in the cross border pool, they are subject to random selection at any time no matter where they are. We tried to look into the logistics of narrowing this only to selection during a U.S. run and it was absolutely impossible to set up an appropriate pool. One day they may go south, the next west etc. etc. and you can simply not put them in and take them out depending on what day it is/direction they are going. Either they are designated for cross border work or they are not, and once in the pool they remain in until no longer subject to U.S. work. I can't see this working any other way. Therefore, I am trying to decipher the intent of this particular rule.

We have found that sending samples north is very difficult and as a result, if most of the testing takes place in the U.S., this would mean companies would have to contract for separate collection and analysis systems in the U.S. (very costly, time delays on results etc.). In addition, please recognize that this does not avoid any litigation in Canada; employment action would still come under Canadian employment law and be subject to litigation in Canada regardless of where the sample was collected and analyzed.

Quite honestly, it will be far more difficult if not impossible for Canadian companies to manage a random program that only takes place in the U.S.

I do not know how you could avoid requiring testing for cause in Canada; if an employee in the U.S. random pool is in a reasonable cause or reasonable suspicion circumstance when he/she happens to be north of the border instead of south, they are still in violation of the rules. The individual should be pulled from U.S.-bound duty and expected to follow all appropriate steps before and after reappointment.

3. When Testing Takes Place: Since reasonable cause and post incident testing (as well as post treatment/violation monitoring programs) have been upheld in the Canadian courts, I can not see any difficulty for Canadian railroads when it comes to complying with FRA requirements when cross-border workers are in Canada. Likewise, all major railroads have been conducting pre-employment testing for risk/safety-sensitive positions for many years without problem.

Although random testing remains controversial, there will likely be decisions in the next year or two that will clarify the situation. In the interim there have been no challenges to the regulated requirements for cross-border trucking; the unions and human rights commissions have publicly stated they have no choice and are not going to fight these programs. The rail unions may see things differently, but I doubt it; principle counsel for a number of the unions has told me he does not see any percentage in mounting a challenge when the testing is directed by government legislation.

4. Breath Testing: The Canadian labs have collections systems either through their own clinics or contracted providers, which provide access to devices from the conforming products list for breath testing across Canada and comply with the part 40 collection requirements. Compliance for FRA purposes should not be a problem. They may just need to set out a few more machines in strategic locations.

I hope these ideas are useful, and would be happy to discuss them with you at your convenience. I will be in Mexico until February 19 but picking up messages if you need to discuss this before my return.